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In The

Supreme Court of the United States

October Term, 1969

No. 1374

MARTIN A. BEATTY,

Petitioner,

vs.

RANDOLPH K. ELLINGS, CITY OF WINONA, HOUSING AND REDEVELOPMENT AUTHORITY OF WINONA, GEORGE M. ROBERTSON, JR., JAMES BRONK, MARLOWE BROWN, JAMES McCABE, HAROLD BRIESATH, DANIEL BAMBENEK, HENRY V. PARKS, MURIEL OLLOM, JIM D. MOHAN, HAROLD THIEWES, JAMES V. STOLTMAN, NEIL SAWYER, BARRY NELSON, DAVID L. JOHNSTON, DONALD KLAGGE, JERRY BORZYSKOWSKI, ALLYN S. MORGAN, JR., L. W. GOLDBERG, N. J. FISCHER, JOSEPH E. KRIER, WM. J. THUROW, FRANK CUNNINGHAM, WM. O. FINKELNBURG, E. J. SIEVERS, PHILIP BAUMANN, JAMES T. SCHAIN, NORMAN E. INDALL, WM. F. WHITE, JAMES FOSTER, JERRY PAPENFUSS, FRANK G. MERTES, DONALD GRAY, HOWARD KELLER, REPUBLICAN HERALD PUBLISHING COMPANY, JAMES B. GOETZ, RADIO STATION KAGE, GEM RADIO STATIONS CO., JAMES B. GOETZ, MERLIN J. MEYTHALER and REX N. EYLER, co-partners, doing business as WINONA BROADCASTING CO., KWNO BROADCASTING CO., CHAMBER OF COMMERCE OF WINONA, DONALD STONE, and ARNOLD STOA,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF PURSUANT TO U.S. SUPREME COURT RULE 24, SUBSEC. 5 & 4.

Of Counsel for Respondents:

C. STANLEY McMAHON
Professional Building
Winona, Minnesota 55987
Phone 507-454-1594

R. P. BROSNAHAN
68 East Fourth Street
Winona, Minnesota 55987
Phone 507-454-2925

JOHN A. COCHRANE
Suite 830, Minnesota Building
St. Paul, Minnesota 55101
Phone: 612-224-7505
Attorney for Respondents

MARTIN A. BEATTY, *Pro Se*
116 Center Street
Winona, Minnesota 55987
Phone: 507-454-1818

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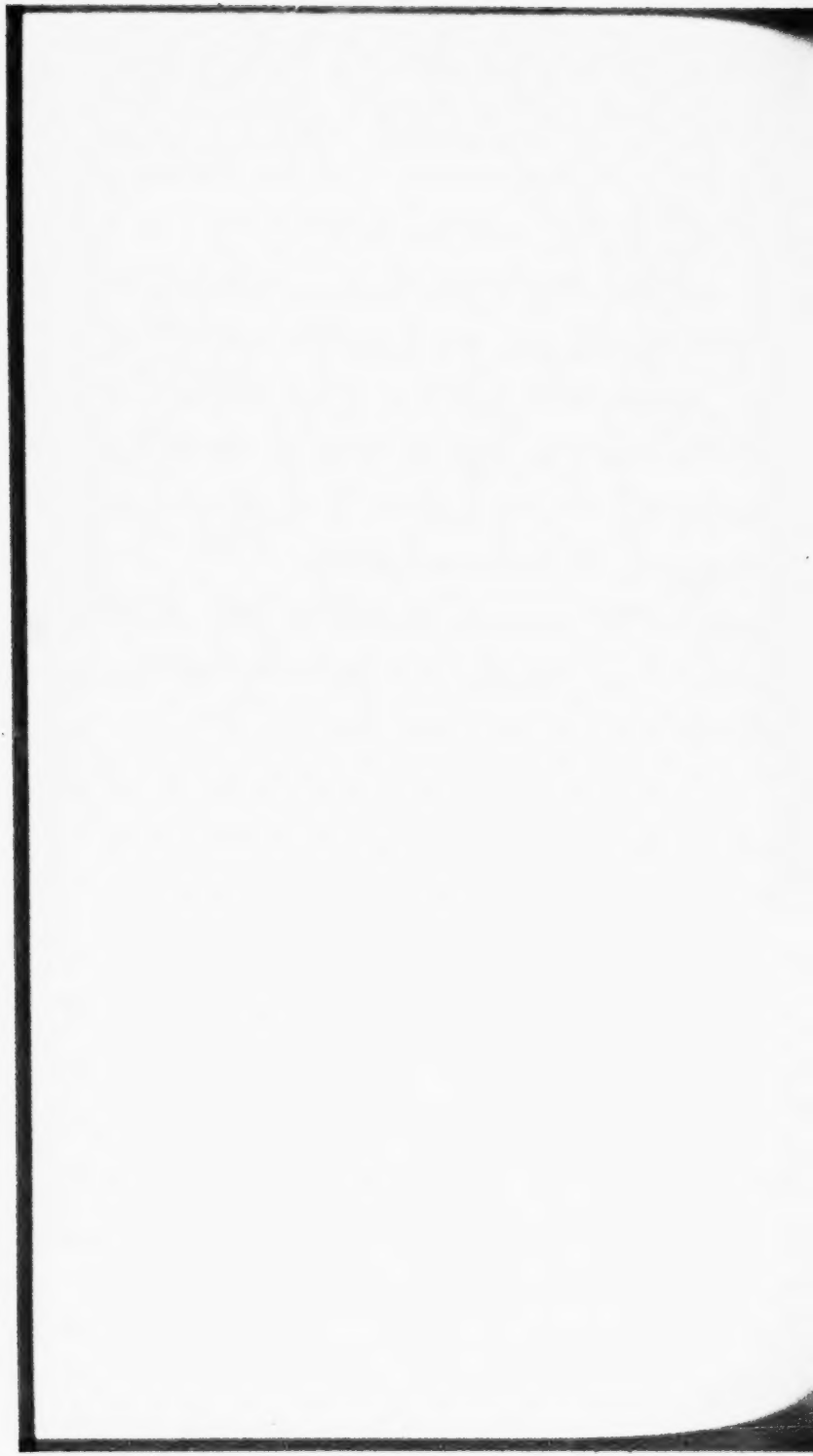
PETITIONER'S SUPPLEMENTAL BRIEF PURSUANT TO U. S. SUPREME COURT RULE 24, SUBSEC. 5, & 4.

ARGUMENT

1. Right of a Citizen to attend all meetings of the local public body.

Respondents while chiding petitioner for framing "His Own Definition of What a Public Meeting Is," have cited no case discussing U. S. Constitutional Amendments I, V, IX or XIV as they relate to the asserted right of the people to attend the meetings of the local public bodies.

The five state court decisions respondents cite (R.4) interpret state statutes. In Acord v. Booth (1908) 33 Utah 279, 93 P 734 the Citizen plaintiff who was removed by a marshal from a "committee of the whole," recovered nominal damages for humiliation and for being deprived of his right to attend. The holding in Turk v. Richard, 47 So.2d 543 (Fla. 1950) has been explained in Times Publishing Company v. Williams,



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222 So.2d 470 (Fla. 1969) and in Board of Public Instruction of Broward County v. Doran, 224 So.2d 693, (Fla. 1969), following the subsequent enactment of Florida's "Government in the Sunshine Law." Both of the 1969 decisions ruled against secret executive sessions. In the later case the Florida Supreme Court enjoined (p. 700)

> "any meeting or conference session * * at which are held any discussions on matters pertaining to the duties and responsibilities of the Board * *."

As distinguished in petitioner's Reply Brief before the Minnesota Supreme Court, Beacon Journal Pub. Co. v. Akron, 3 Ohio St.2d 191, 209 NE2d 399 was concerned primarily with the origin of the powers of the different public bodies. In Barnes v. City of New Haven,140 Conn.8, 98 A2d 523 "the fundamental question

for decision" as stated at p. 527 was "whether the parking project is a legitimate public purpose." There no one was prevented from attending any meeting, and it appears doubtful that the cause was a truly adversary proceeding. Alphen v. Shadman, 330 Mass 60, 116 NE2d 252 was about money, a commission, not about civil rights.

Whether by premising a Citizen's right to attend all of the meetings of the local public bodies upon sections of the federal Bill of Rights constitutes the novel approach to the problem that respondents suggest, is immaterial. Petitioner's position is merely an application of the so-called "Right to Know," espoused by James Madison, and other authorities following:

Thayer, Legal Control of the Press, 1956, 3rd ed., The Foundation Press, Sec. 30:

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"The right to report is of course dependent upon the ability to gather news. Obviously, the United States Constitution does not give one the specific right to collect news, however, there is no prohibition; the several state constitutions give no more than the freedom to speak and write what one pleases; the right to gather and report news, so vital to the press, is granted inferentially. Legally, the rights not granted to the Federal Government are reserved to the states or to the people, and so the right to gather news remains with the people." Gillmor and Barron, Mass Communication, 1969, West Pub. Co., Ch. V, Sec. 1, p. 453:

"In a preceding section the point was made that government like the privately owned media had an obligation to provide a structure for dialogue in the continually increasing sector of national life which is under government control. Such a goal relates to what is sometimes called the people's right to know. * *.

"Recently Sec. 3 of the Administrative Procedure Act of 1946, 5 U.S.C.A., Sec. 1002 was amended and the Freedom of Information Act, 5 U.S.C.A. Sec. 522 (1967), was enacted. Here the focus is not on access for opinion but an access for information. The latter, like the former, may someday be predicated on a positive constitutional duty of government." (Emphasis added).

Swindler, Problems of Law in Journalism, 1955, The MacMillan Co., Chapt. III -

Freedom to Gather News @ p. 77:

"The freedom to publish news and comment is of little value without the corollary freedom to gather the news."

Siebert, The Rights and Privileges of the Press, 1934, D. Appleton-Century Co., Inc.:

(Under his classification of municipalities) "where there is neither statutory nor charter provision requiring the council to conduct its meetings in public,"

the author states at p. 66:

"The point has never been adjudicated in the United States, * *."

"If the point comes up for decision in the courts of the United States, consideration will probably be taken of the peculiar character of a municipal corporation as compared with other governmental units. The corporation is composed of the corporate electors who have a right to be informed of the activities of the elected representatives."

Siebert comments upon the municipal governmental unit @ p. 64, as follows:

"The organization and operation of the municipal unit is probably the most complicated problem of modern government. The entire public participated in the original town meeting, but in large metropolitan cities the government must be carried on through delegated authorities. In those centers the Press serves as the sole medium of publicity. [Nt. 25 - The procedure of city councils differs from that of other

legislative bodies chiefly in the degree to which they admit participation by persons not members of the council.]

See also Pierson v. Ray (#79) and Ray v. Pierson (#94) 386 U.S. 547, 87 SCt. 1213, 18 L.Ed 2d 288, re: conspiracy to deprive one of civil rights.

That, as noted by respondents, the Minnesota Supreme Court thought little concerning the U. S. Constitutional basis of Citizens' rights, is regrettable. It is particularly so in this new era of awareness of individual constitutional rights.

In the case at bar, with no unlawful conduct by petitioner, the clean civil rights issue should have been considered by the Minnesota Courts. Here the jury plea of Andrew Hamilton is germane.

> "But to conclude; the question before the court and you, gentlemen of the jury, is not of small private concern, it is not the cause of a poor printer, nor of New York alone, which you are now trying; no! it may, in its consequences, affect every freeman that lives under a British government on the main of America.

> It is the best cause; it is the cause of liberty; * * the liberty both of exposing and opposing arbitrary power * *, by speaking and writing the truth." (Trial of John Peter Zenger, 1753, 16 American State Trials, 17 et seq.)

Boyd v. United States, 116 U.S. 616, 635, 6 SCt. 524, 29 Led 746, 752:

> "* * unconstitutional practices get their first footing * * by silent approaches and slight deviations from legal modes of procedure. * * It is the duty of the courts to be watchful for the rights of the citizen, and against the stealthy encroachments thereon."

The Citizens too must challenge the invasion of their civil rights.

> "For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while there was time." Dissenting opinion of Justice Sutherland in The Associated Press v. National Labor Relations Board, (1937) 301 U.S. 103; 57 SCt 650; 81 Led 953, 965.

James Madison's observations would seem to be as pertinent to the local public bodies as to the state and national bodies.

"A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or Tragedy; or perhaps, both!" (9 Writings of James Madison 103, Hunt Ed. 1910, letter to W. T. Barry, Aug. 4, 1822).

* * *

Open Meeting Statutes, The Press Fights for the Right to Know, 75 Harvard LR. 1199, 1200:
"The people must be able to go beyond and behind the decisions reached and be appraised of the pros and cons involved if they are to make sound judgments on questions of /1201/ policy and to select their representatives intelligently. The presence of outside observers is an invaluable aid in making such information available, for official reports, even if issued, will seldom furnish a complete summary of the discussion leading to a particular course of action.

Times Publishing Co. v. Williams, supra,

(Fla. 1969) 222 So.2d 470, 473:

"* *. This act is a declaration of public policy, the frustration of which constitutes irreparable injury to the public interest. * *."

(p. 699)
"The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength

to our country. During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with 'hanky panky' in the minds of public spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in government agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made."

2. Right of a Citizen to see the letters, papers and documents of the local public bodies.

Respondents contend this issue is not raised in the pleadings, and not considered by the state Courts.

Petitioner omitted to specifically quote Complaint par. 24, which alleges:

"24. That in furtherance of such plan such public bodies have been conducted in such manner that from time to time plaintiff has been wrongfully denied access to public information, reports and writings, and his com-

munications to such bodies have been disposed of irregularly."

However, the Petition notes that an alleged right to see the letters, papers and documents is included within Complaint par. 10 among the "lawful rights and privileges as a citizen, * *."

Said Par. 24 was specifically denied in the Separate Answer of Randolph K. Ellings and others, and was denied by a general denial in the Separate Answer of WHRA and other defendants.

In the first section of his Brief in the Minnesota Supreme Court petitioner specified the alleged right as follows:

"I. The rights and privileges of a citizen of Minnesota include: * *

1. * *.

2. a freedom of access to public information, * *."

Petitioner then cited U. S. Constitutional Amendments IX and X as well as Constitu-

tional and statutory provisions and case law of Minnesota.

Respondents have never refuted petitioner's evidence that public information was denied him. Some illustrations of such withheld documents are mentioned in the Petition at p. 9.

Also illustrative are the letters dated 7/27/65 and 8/4/65 noted in respondents' appendix (A.28).

Petitioner's letter to WHRA demonstrates that by the device, (clearly evasive, and likely conspiratorial) of directing the Citizen to the private planning firm, which owes no duty to the Citizen, the public body successfully denied to the Citizen the public's information. Paraphrased, the letter of 8/4/65 reads:

> "At a meeting of the * * (WHRA) on the evening of July 20, 1965 I made a request for a copy of a preliminary draft of a downtown general neighborhood renewal plan

presented that evening by Mr. Chapman. Copies thereof were handed to members of the Authority that evening. I made my request as a citizen and taxpayer.

"* *.

"* *. (WHRA member) Mr. Morgan stated my demand would be referred to the Attorney for the Authority.

"I received a communication from Mr. C. Stanley McMahon Esq. dated July 27, 1965. He stated in part as follows: 'This draft * * is the property of Nason, Law, Wehrman and Knight, Inc. (a private planning firm) and if, for some reason, you wish copies of their materials, the request should be addressed to them, attention Mr. Chapman.'

"I have made my demand to the Authority. I hereby renew that demand, and I respectfully decline the suggestion that I seek the preliminary plan elsewhere." (Parenthetical phrases added). (Paulson deposition p. 94, 95)(7).

Although most of the determinations concerning access to records are found in state court decisions, it was held in Providence Journal v. McCoy, 94 F Supp

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Ft. Nt. #7- Petitioner's correspondence in 7 manila envelopes marked Defendants' Exhibits 8 through 14 was copied and filed with the deposition of petitioner. The individual letters were not separately numbered as Exhibits.

186, 90 F2d 760, cert. den. 342 U.S. 894; 72 SCt. 200, 96 LEd. 119, that a Pawtucket ordinance prohibiting any official to make public the records of tax abatement violated the equal protection clause of the 14th Amendment.

3. Public Figure.

In discussing "public figure" respondents point out that plaintiff was a practicing attorney in a small city.

But attorneys are people too, and like doctors, teachers and candlestick makers, they value their reputations. It is suggested that one's trade or profession provides neither a valid nor fair criterion for branding one a "public figure."

Respondents affirm that the term "public figure" should be viewed in the context of the area concerned. This consideration immediately renders immaterial

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petitioner's correspondence with state and federal officials. It also favors the critic of national policy over the critic of the village council, for the latter earns the title instantly.

It is suggested that neither the private and innocuous activity of clipping news stories, nor attending meetings of public bodies, properly qualify one for the mantle of "public figure."

In citing the motion for change of venue as indicating that petitioner is a "public figure" respondents ignore the fact that the reasons supporting the motion were principally the asserted wrongs of respondents including: (1) the alleged conspiracy to "publicly vilify and discredit plaintiff by word and deed," (Complaint par. 10c and d), (which included an editorial campaign) and to "thereby ruin the plaintiff's reputation as an attorney and as a citizen," and

(2) the subsequent and unprecedented publication of selected portions of the pretrial oral deposition of petitioner by the respondent newspaper. Over neither of these circumstances had the petitioner any control. Over neither such vilifications nor over his trial by newspaper, had the petitioner any control.

Does a motion for change of venue distinguish a defamation suit plaintiff as a "public figure"? At least this concept permits a choice. The plaintiff can elect between a dismissal or a biased jury.

But respondents' next proposal insures dismissal!

Seemingly less than convinced themselves that the evidence casts petitioner as a "public figure," respondents in all seriousness submit:

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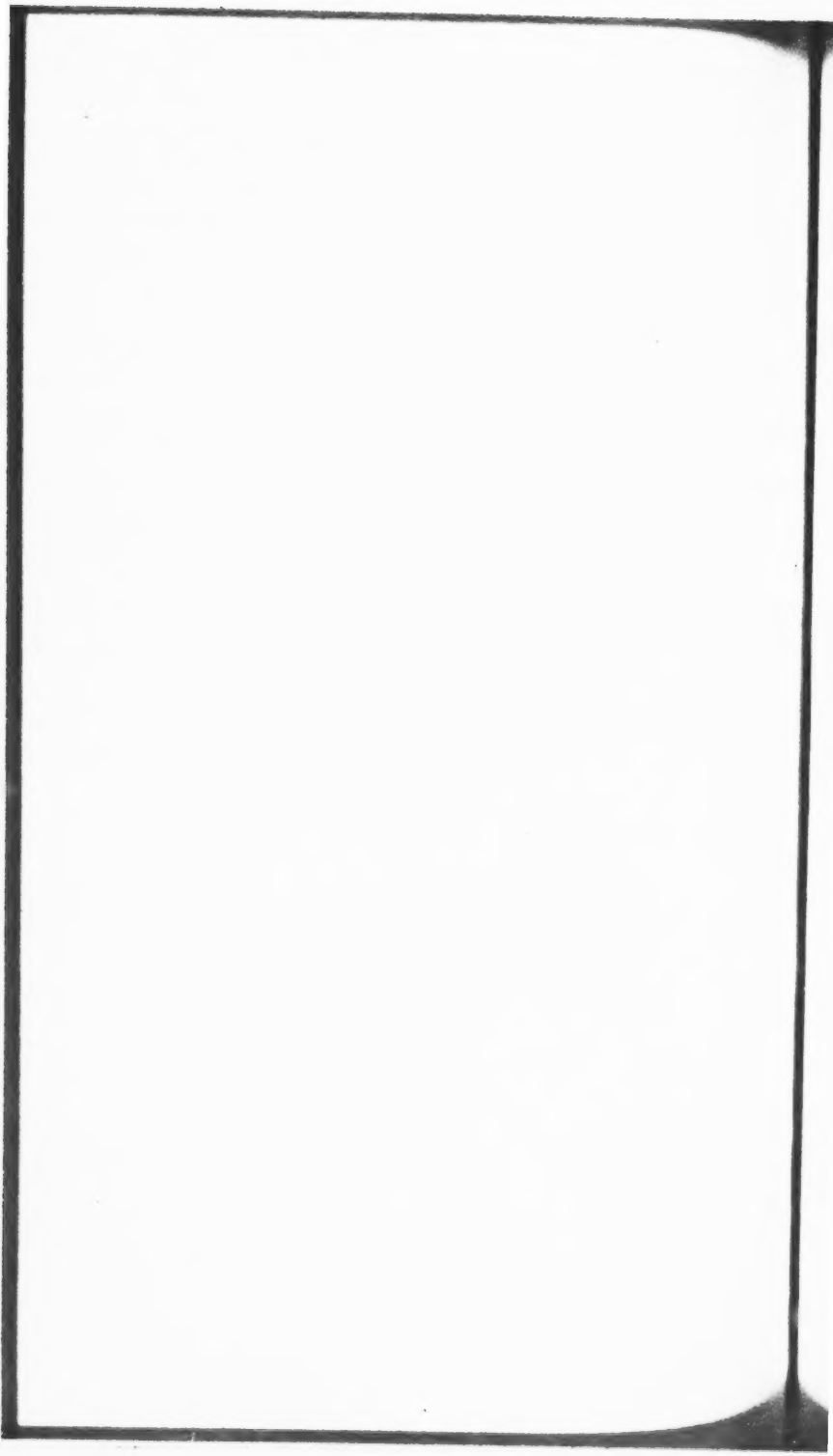
> "that even without any evidence, the mere fact that petitioner has commenced two lawsuits against numerous * * prominent figures * * in the community, including the mayor, councilmen, and members of the Housing and Redevelopment Authority, * * would require a holding as a matter of law that he was a public figure * *." (Res. Br.8).

Ergo! The perfect defense for public officials; - - as well as the end of defamation suits against them.

Actually respondents propose that by commencing only one lawsuit the plaintiff becomes a "public figure," for it is unlikely that they mean that the defamation suit itself insures the plaintiff's defeat. Or do they mean it?

Fortunately for this petitioner and other plaintiffs, respondents cite no legal authority for their absolutist position.

The more respondents strain to manufacture a defense upon the issue of "public figure" the more they lose sight



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of the essence of the Sullivan doctrine, as stated at 11 Led 2d 708:

> "Madison said * * the 'censorial power is in the people over the government, and not in the government over the people.'"

It is further contended by respondents that, other considerations aside, petitioner became a "public figure" by his letter of 11/14/64. (Resp. A-69), (Petition 10).

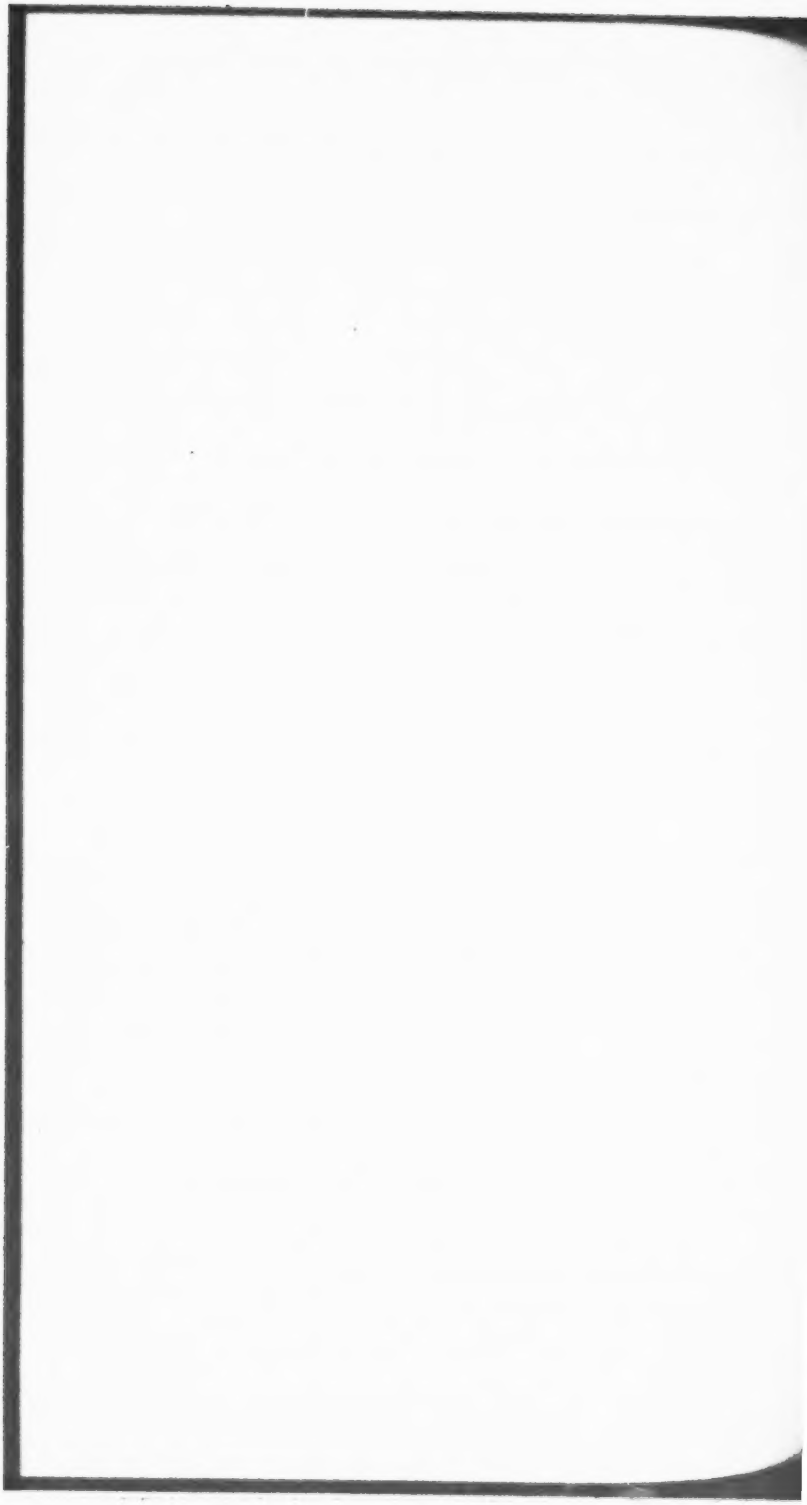
The letter recited the difficulty that Petitioner encountered in seeking out the meeting and in attending it. As stated therein:

> "I explained that Mr. Donald E. Stone, the Chamber Manager, had denied me the right to attend a prior and secret City Council Meeting held at the Chamber Building." (Resp. A-70).

To the end that those truly responsible might know that, as therein stated,

> "this was of course a violation of my civil rights by the Chamber and its membership," (Resp. A-70),

copies were sent to "all Winona resi-



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dent members of the Winona Chamber of Commerce." (Carney, Reporter, deposition 20), (See Opinion, Petition,A-5). Having encountered a skein of evasion by the public officials and Chamber officials about the meeting, petitioner could anticipate an evasion of responsibility by the Chamber Members for the acts of their officers, or even a lack of knowledge thereof; and surely no change in policy, until apprized in writing of their individual and collective responsibility.

Having pointed out in the letter that the "abuse has reached a point just short of violence," (Resp. Br. A-75) petitioner also sent copies to "the other public and civic bodies (that) were represented at the captive meeting." (Resp. Br.A-75).

If a Citizen is to be branded a "public figure" and be thereby made

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fair game for libel and slander by the public officials and the news media because he confronts, with a signed letter, the individuals directly responsible for the interferences with his civil rights; then indeed the Citizen has been put into a box. The Citizen is thereby punished for the acts of those who defame him.

Respondents' contention that if "petioner were not a public figure" before the 11/14/64 letter "he certainly was after" (Res.7) overlooks the fact that two alleged defamations had already occurred, that of respondents Mayor Ellings on about 6/15/64 (Complaint par. 20) and Joseph E. Krier on 7/21/64, (Complaint pars. 16 and 21).

Respondents are left then with the two bare facts. First, that some of plaintiff's lawful questions of and statements to the public bodies were reported by the news media. Over this circumstance

petitioner had no control; and it does not provide a fair criterion where the Citizen sought to lawfully oppose the taking of his building. Secondly, the "vortex" concept would appear to be even less definitive under such circumstances.

4. Inaccuracies in respondents' Appendices require clarification.

Asserting that despite the fact that "petitioner's statement of the case covers 18 pages," it is inadequate, (Res.Br.1), respondents have attached to their Brief a "Summary of Beatty Correspondence" as Appendix B, and a "Summary of Beatty Depositions" as Appendix C.

In some instances the condensation of the material has left a record which is not accurate. For brevity, only two examples will be set forth.

Respondents' summary (Res.A-32) of the letter of 3/3/66 to City Council

reads:

> "Asking that the minutes be amended to show the problem of leasing the City's Marina and the question of a referendum were discussed, although no action was taken thereon."

This letter, a respondents' exhibit, is attached to this Supplementary Brief as Appendix C.

Respondents' summary states:

(87)-He (petitioner) has not gone to a psychiatrist since 1964. (Resp.A-65).

Since about the time of the signing of the transcript of the oral deposition on about 4/6/67 respondents have known that petitioner has "never gone to a psychiatrist." (Carney Deposition 87, line 9). (Emphasis added).

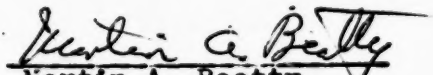
Yet, as shown in the Reply Brief before the Minnesota Supreme Court, at pages 38-40, respondents have repeatedly foisted upon the Judges of the Minnesota Courts, and now upon the highest Court, a diametrically opposite and false im-

pression with the quote: "He has not gone to a psychiatrist since 1964."

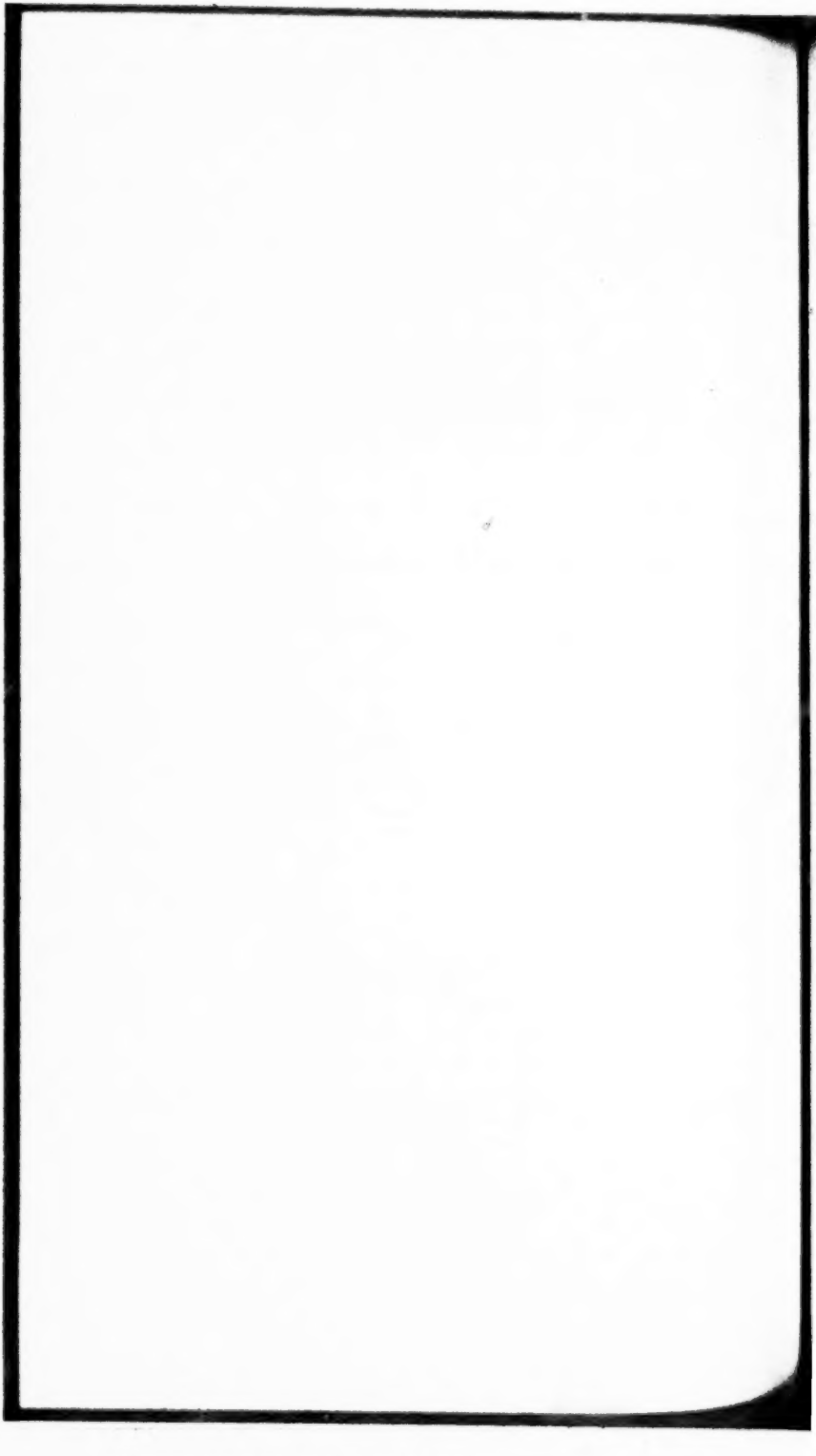
Such distortions amount to a presentation of new non-facts not found in the evidence.

In petitioner's view the summaries are not helpful in either an understanding of the facts, nor in the isolation of the federal questions.

Respectfully submitted,



Martin A. Beatty
Petitioner, pro se
116 Center St.
Winona, Minnesota
Ph. 507-454-1818



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APPENDIX C
(For Appendices A and B see Petition)

March 3, 1966

President and Members
of the Winona City Council
Winona, Minn.

Sirs:

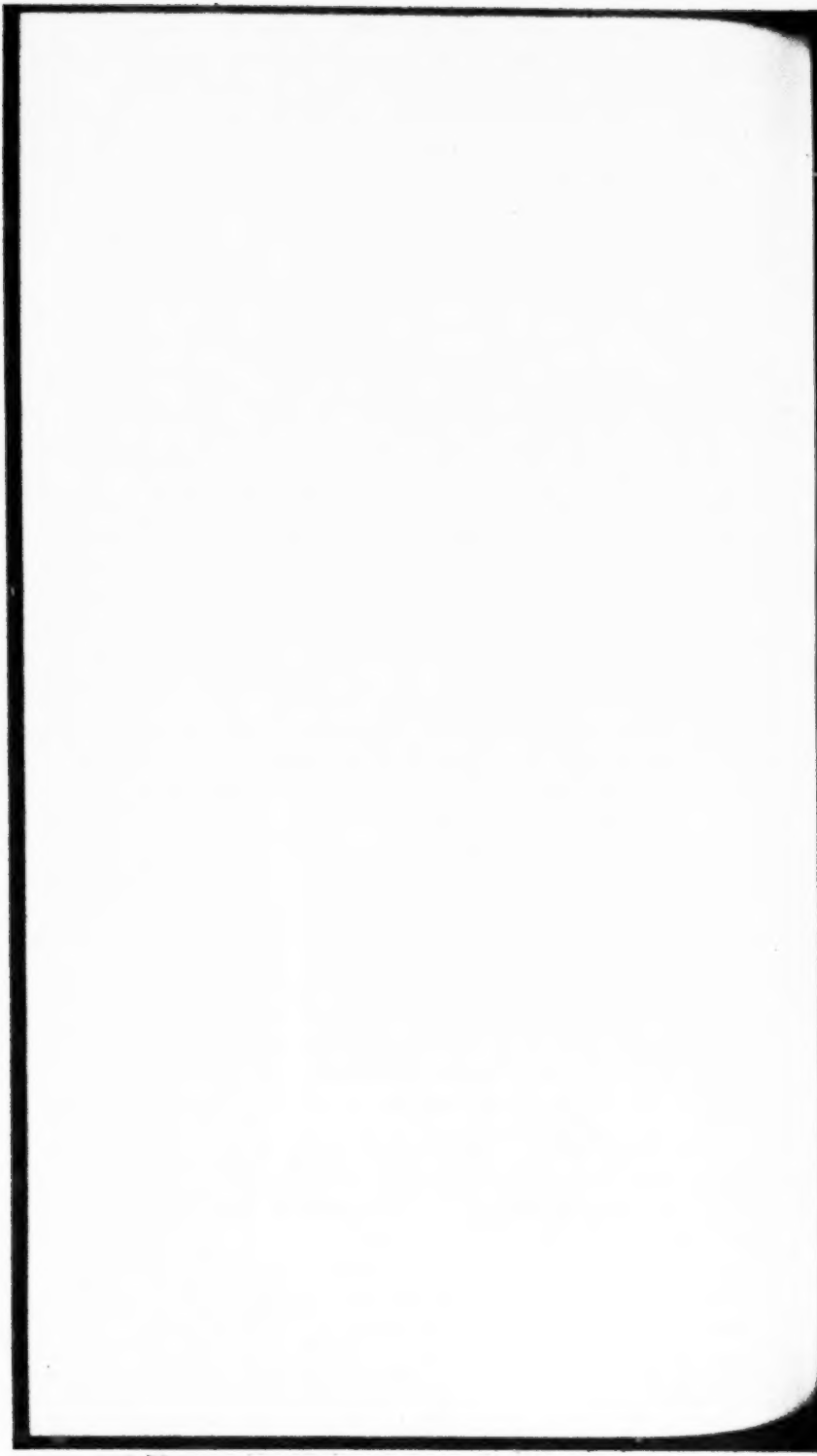
As a resident and taxpayer I wish to point out certain important omissions in the minutes of the Special Council Meeting held on January 31, 1966.

In the minutes as approved at a Council Meeting held on Feb. 7, 1966 there is no mention of two matters which were discussed at great length. These matters were as follows:

1. The problem of leasing the City's Marina in the event that the present lessee, Mr. Jack Zywicki, does not continue as a lessee thereof, and
2. The problem of the failure of the City of Winona to be prepared to hold a referendum on Feb. 7, 1966 on the question: "Do you want federal aid for urban renewal?"

The grossly peculiar circumstances of the 3-part Council Meeting of Jan. 31, 1966 were as follows:

At 7:37 P.M. the City Council met in Special Session in the Court Room in the City Building. Aldermen Harold Briesath, David L. Johnston, also known as Dave Jaye, Neil Sawyer, Donald Klagge, James Stoltman, Jerry Borzyskowski, and Barry Nelson were present. Aldermen



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Thiewes and Parks were absent. The announced purpose of the meeting was to discuss the Urban Renewal Plan for Winona with members of the Housing and Redevelopment Authority.

Council President Briesath presided. Several members of the public were in attendance as well as 3 representatives of the news media.

The meeting was turned over to Dr. Wm. Finkelnburg, Chairman of WHRA, and to C. Stanley McMahon, the Attorney for WHRA. These men discussed the progress of the urban renewal plans. Both men dwelt on the probability of securing so-called "non-cash credits" computed upon the basis of construction work that has been completed at Winona State College. This "Act I" of the 3-part Council Meeting was in itself amazing, for the WHRA delegation not only arrived with answers for the Council Members, but they provided the questions as well! Dr. Finkelnburg characterized the urban renewal plan as the City's "wishbook"; he likened the non-cash credits to "a pot full of green stamps", and also as "our little goodies" which Winona can secure "by legal hocus pocus". Mr. McMahon on his part complained that "there has been more heat than light" shed upon the urban renewal question. Attorney McMahon diagnosed the city's core area as "stricken with coronary disease needing treatment".

(p.2.)

At about 8:40 Ald. Stoltman moved for adjournment, Ald. Johnston 2nded, motion carried, all voting aye. Members of the public left, except myself.

The 3 press representatives also left.

Then the astonishing preliminaries for "Act II" of the Council Meeting were put in motion. The Council members stood around; there was putting on of wraps and other departure activity, including going down the stairs by some Aldermen, presumably to leave the building. After about 15 or more minutes the Council Members returned to the Court Room, saying they would have a "Committee meeting", altho the returning group consisted of all 7 Council Members who had participated in "Act I" of the evening's fantastic performance.

"Act II" of the Council Meeting dealt with the municipal marina and the Council's difficulties with Mr. Zywicki. Ald. Neil Sawyer stated, "Mr. Zywicki owns a lot of property in town. When his tenants don't pay their rent, they get put out." Some Council Members favored having a Mr. Dick Kanz for a new operator. It is not known when this public business was discussed or developed, or where. There was no indication that members of the public would have opportunity to apply for the lease, should it become available, or that it would be let on open bids. Thus ended "Act II". KAGE Reporter Wayne Valentine returned for part of this discussion.

The preliminaries to "Act III" were almost the same as those preceding "Act II". There was no motion for adjournment at the conclusion of "Act II". For "Act III" two aldermen entered the Court Room wearing their outer wraps, and there removed them. They went through the same phantasy of calling it

a"committee meeting", altho again it was the same 7 Council Members who returned for the concluding act.

This third part of the Council Meeting dealt with efforts to have a meeting of minds, and present a united front at the Council Meeting to be held on Mon. Feb. 7, 1966 to deny to the Voters of the City the referendum on renewal. The Voters had been promised the Referendum in March, 1965. Ald. Briesath held out for standing behind the Attorney General's opinion which, he stated, holds that the referendum could not be held. "Act III" ended shortly before 10:00 P.M.

To my mind, this bizzare performance is further evidence of the determined, deliberate, calculated effort of the 7 Members then present to deal with the public business in secret, instead of in open meeting as required by law.

I hereby request that this account of the Council Meeting of Jan. 31, 1966 be incorporated into the present incomplete minutes of same.

Martin A. Beatty